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The Impact of Brexit on UK Labour Law

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The recent vote by the UK electorate to leave the European Union (EU), known as Brexit, has potentially enormous implications for employment rights in the UK, most of which are now underpinned by EU law. At present the vote has no legal effect but if Brexit happens all these rights are legally vulnerable. The article examines how workers' rights informed the debates surrounding Brexit, the history of the UK's attitude to EU employment rights, and how the employment rights and remedies guaranteed by EU law currently affect UK labour law and policy. It analyses the legal mechanism likely to be adopted by the UK to change EU-guaranteed employment rights post-Brexit, and highlights some of the factors likely to contribute to the future form of UK labour law, including UK government policy, the effect of employment tribunal fees, the trading relationship between the EU and the UK, and the position of the devolved administrations in Scotland, Wales and Northern Ireland.

1. INTRODUCTION

On 23 June 2016 a referendum in the UK resulted in a vote to leave the EU - 'Brexit' as it has come to be labelled. The narrowness of the victory - 52 per cent for leave against 48% for remain - obscured deep divisions between regions (London and Scotland voted overwhelmingly to remain, for example), age groups, educational level, and classes which broke with traditional political party allegiances.¹ The result sent out powerful shock waves throughout the UK and beyond, generating many unpredictable consequences. Most expected a 'Brexit' vote to lead to the replacement of the then Conservative Prime Minister, David Cameron, with a pro-leave 'Brexiteer', probably the buffoonish right winger Boris Johnson. But following Cameron's resignation on the day the result was announced the Government is now presided over by a 'remainer', Theresa May. The referendum also provided the spark which ignited the internal conflicts that now threaten to split the opposition Labour Party, led by a lukewarm 'remainer' on the Left, Jeremy Corbyn. It is hard to think of any time since the Second World War when UK politics have appeared more indeterminate and volatile.

For the present, however, the legal position is unaffected. In the UK a referendum of this sort has no legal effect, regardless of the political impetus it creates.² The UK cannot be compelled to leave the EU. Until the UK Government notifies the

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¹ See e.g. the Yougov Survey Results at https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/oxmidrr5wh/EUFinalCall_Reweighted.pdf (accessed 23 August 2016).

² The European Union Referendum Act 2015 conferred power to hold the referendum but it imposes no duty to take any action after the result.

European Council that it has decided to trigger Article 50 of the Treaty of the European Union (TEU) and completes the painful process of negotiating a withdrawal agreement, the EU Treaties and secondary law continue to apply in full to the UK. The time-table envisaged by Article 50 is two years unless all members of the European Council agree, but longer may well be needed to disentangle a large state such as the UK from the EU.³ By the same token, for the time being the UK legislation which gives domestic effect to the EU Treaties, the European Communities Act 1972, remains in force unamended, as does the mass of UK legislation implementing EU law. There is still no firm time-table for the date when the UK will invoke Article 50, let alone any indication of the shape of the UK's future trading relationship with the EU or when the process of extraction will be completed.

Barring a radical *volte face* by the Government, the indications are that Brexit will take place in the not too distant future. The Government's current position is that it will serve notice under Article 50 in early 2017. When and if Brexit eventually happens, leaving the EU will potentially have very profound effects for the legal rights of workers of the UK. Most of the existing individual employment rights in the UK are now underwritten by EU law, with the principal exceptions of unfair dismissal law and the legislation on the national minimum wage, neither of which falls within the current scope of EU law.⁴ Brexit will grant the legal freedom for a government to remove or water down these rights, and go much further in delivering the highly 'flexible', deregulated labour market to which successive UK governments, and especially Conservative ones, have aspired.

This subject figured prominently in the debates prior to the referendum, though less so than other issues such as immigration. Most trade unions in the UK, and their umbrella organisation, the Trade Unions Congress (TUC), supported 'remain', in no small part owing to the EU-backed guarantees of workers' rights. In his interventions in the Brexit debates, the Labour leader, Jeremy Corbyn, warned of the threat of a 'bonfire' of workers' rights if the UK left the EU.⁵ On the other side, prominent 'leavers', repeatedly making pleas to regain control over 'our' laws, drew attention to what they claimed was the high cost of EU employment regulations, including those

³ For discussion, see the report of the House of Lords European Union Committee, *The Process of Withdrawing from the European Union* (2016), available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf> (accessed 25 August 2016).

⁴ On pay, see Article 153(5) Treaty on Functioning of the EU (TFEU), though this does not prevent EU legislation which affect pay indirectly, such as equal pay laws: see Case C-268/06, *Impact* [2008] ECR I-2483 at paras 124-5; on dismissal, see Case C-117/14, *Pocława v Ariza Toledano* [2015] IRLR 403.

⁵ Reported in e.g. *The Guardian*, 14 April 2016 (at <http://www.theguardian.com/politics/2016/apr/14/jeremy-corbyn-leaving-eu-would-lead-to-bonfire-of-rights>; accessed 30 August 2016).

such as the Working Time Directive and the Temporary Agency Work Directive.⁶ The Minister for Employment, Priti Patel, went so far as to call for the UK to 'halve the burdens of EU social and employment legislation' in the event of Brexit.⁷ In the mostly binary world of the debates, the effect of Brexit on EU-derived employment rights appeared straightforward: keep them all or dump most of them, especially the most expensive.

But adopting rhetorical positions without the responsibility of power is one thing; taking decisions when in government is altogether different. The Brexit referendum result exposed a vacuum: the absence of any clear plan or vision within the UK Government about even the broad nature of the UK's future relationship with the EU. Though for the moment the Conservative Government has proven much more successful than the Labour party at plastering over its internal divisions on Europe, those conflicts have not disappeared. What will in fact be the future shape of employment regulation in the UK, then, is a matter of radical indeterminacy. In addition to the problem of knowing a future government's policy towards employment rights, there is much uncertainty about how others involved in the process - the EU, the devolved administrations in Scotland, Wales and Northern Ireland, the electorate, workers and businesses - will respond.

In the absence of clearer guidance, a useful starting point is the UK's past stance towards EU-derived employment rights, which casts some light on the preferred candidates for removal or amendment in the future. I discuss this in the next section. In the third section I provide an overview of the current position of UK employment law and its intersection with EU social policy, to see what is potentially at stake. Finally, in the fourth section I sketch out the goals, factors and constraints which are likely to influence future legislative activity in employment law.

2. THE UK'S PAST RELATIONSHIP WITH EU EMPLOYMENT LAW

When the UK joined the then European Community (EC) by signing the 1972 Treaty of Brussels there was no indication of any tension between EU social rights and UK policy in the employment sphere. European social law barely existed at the time. It was only in the mid-1970s that the first Directives appeared, on equal pay and equal treatment between the sexes, collective consultation on redundancies, and transfers of undertakings;⁸ and it was not until 1976 that the Court of Justice (ECJ) delivered its

⁶ Respectively, Directive 2003/88/EC and Directive 2008/104/EC.

⁷ Speech to the Institute of Directors reported in e.g. *The Belfast Telegraph*, 18 May 2016 (<http://www.belfasttelegraph.co.uk/business/news/brexit-would-boost-uk-economy-by-43bn-claims-patel-34723908.html>; accessed 30 August 2016).

⁸ See respectively Directive 75/117/EC (equal pay), 76/207/EEC (equal treatment), 75/129/EEC (collective redundancies), 77/187/EEC (transfers). For a fuller account, see C. Barnard,

important ruling in *Defrenne*, holding that then Article 119 of the Treaty of Rome on equal pay between men and women was directly and horizontally effective because it was one of the 'foundations of the community'.⁹

This gentle wave of European social law washed against a UK system which already possessed a high degree of what now might be characterised as social employment law. Though the UK Government resisted Gabrielle Defrenne's claim on the basis that increasing women's pay would 'seriously aggravate the problem of controlling inflation',¹⁰ its argument was partly undermined by the fact that it had already unilaterally enacted legislation which gave a right to equal pay between the sexes, the Equal Pay Act 1970, even if that Act was not to come into force until 1975.¹¹ Similarly, the UK independently enacted legislation on sex and race discrimination before EU interventions in this area.¹² Around the time of its accession to the EC in 1973, the UK had laws conferring rights to written statements of terms and conditions,¹³ not to be unfairly dismissed,¹⁴ and to redundancy payments;¹⁵ a well-developed system of wage councils laying down minimum wage rates and holiday entitlements in industries which lacked adequate collective bargaining;¹⁶ and a pretty comprehensive system of health and safety regulation applying to different workplaces, in which the overarching legislation provided for consultation with trade union representatives.¹⁷ Add to this a pretty much cost-free employment tribunal for enforcing rights, extensive coverage of collectively bargained terms, and statutory immunity against civil claims in relation to strikes in contemplation of trade disputes, and the very limited EU social initiatives in employment could almost be overlooked.

It was with the election of the Conservative Government headed by Margaret Thatcher in 1979 that the conflict began to emerge between a domestic policy of labour market deregulation, ostensibly justified by monetarist economic theories, and an EU legislative programme aimed at giving a social dimension to the single

EU Employment Law (Oxford University Press, 2012), chapter 1.

⁹ Case 43/75, *Defrenne (No.2) v Sabena* [1976] ECR 455 at 470.

¹⁰ *Ibid.* at 464.

¹¹ A point noted by the ECJ in *Defrenne* at 468.

¹² The Sex Discrimination Act 1975, held by the House of Lords in *Duke v Reliance* [1998] ICR 339 not to intended to give effect to the then Equal Treatment Directive, and the Race Relations Act 1968.

¹³ The Contracts of Employment Acts 1963 and 1972.

¹⁴ The Industrial Relations Act 1971, later re-enacted in the Trade Union and Labour Relations Act 1974.

¹⁵ Originally the Redundancy Payments Act 1965.

¹⁶ See S. Deakin and F. Green, *One Hundred Years of British Minimum Wage Legislation* 47 *British Journal of Industrial Relations* 2056 (2009)

¹⁷ See the Health and Safety at Work etc. Act 1974, especially s.2, and the subsequent Safety Representatives and Safety Committee Regulations 1977, SI 1977/500.

market. The conflict could not be buried in meetings of the Council of Ministers because of the increased powers given to the Council to adopt Directives in the social field by qualified majority voting instead of by unanimity. This meant that UK opposition was no longer a trump card. The process began with the new Article 118a, on health and safety at work, inserted in the then Treaty by the Single European Act 1986, and accelerated once the Treaties allowed Directives in the field of working conditions to be adopted by qualified majority voting.¹⁸ Adopted under Article 118a, the Working Time Directive¹⁹ perhaps provides the clearest illustration of the growing opposition of successive UK governments to EU social law. The Conservative UK Government resisted the Directive, tried to water it down and brought proceedings challenging its legality in the ECJ.²⁰ Implementing legislation²¹ was eventually introduced two years after the deadline when the New Labour²² came into power, but that Government sought to exploit every possible derogation in the Directive.²³ Since then successive UK governments have continued to press for changes to be made to the Directive, and the costs of this ‘controversial’ legislation to business were highlighted in the last Government’s review into the balance of competences between EU and UK employment policies.²⁴

If the opposition to the Working Time Directive was at the extreme end of the spectrum, it nevertheless illustrated what became the default position of UK governments towards EU social legislation. The attitude was not confined to Conservative governments but extended to the New Labour administrations in power between 1997 and 2010, whose Prime Minister, Tony Blair, famously congratulated the UK for having the ‘most lightly regulated labour market in any leading economy in the world’.²⁵ The continuity of labour market policy across

¹⁸ See e.g. the new Article 118 introduced by the Amsterdam Treaty signed in 1997, and Barnard, *supra* n. 8.

¹⁹ Then Directive 93/104/EC, now Directive 2003/88/EC

²⁰ See Case C-84/94, *United Kingdom of Great Britain v Council of the European Union* [1996] ECR I-5755.

²¹ The Working Time Regulations 1998, SI 1998/1833.

²² The label adopted by the government at the time, to distinguish itself from the more left leaning policies of its predecessors.

²³ Such as allowing derogations from the maximum weekly working time under Article 22 by means of individual agreements under regulation 4 of the Regulations. For discussion, see C. Barnard, *The Working Time Regulations 1998*, 28(1) *Indus. L.J.* 61 (1999).

²⁴ HM Government, *Review of the Balance of Competences Between the United Kingdom and the European Union Social and Employment Policy* (2014) 60-61, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332524/review-of-the-balance-of-competences-between-the-united-kingdom-and-the-european-union-social-and-employment-policy.pdf.

²⁵ Department of Trade and Industry (DTI), *Fairness at Work*, Cm 3968 (HMSO, 1998), Foreword (at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file24436.pdf>; accessed 23 August 2016).

Conservative and Labour governments was striking, based on promoting a 'flexible' labour market.²⁶ There are, of course, counter-examples to this broad brush picture. For example, the Labour Government signed up to the Social Chapter when it first came to power in 1997²⁷ and unusually expressed its 'welcome' for a new wave of EU Directives protecting against discrimination at work,²⁸ where UK legislation and policy broadly chimed with the EU initiatives. But enthusiasm for the Social Chapter soon waned, and the default position was expressed in that Government's minimalist implementation of the Directives protecting part-time and fixed-term workers and its sustained opposition to the Temporary Agency Work Directive.²⁹

The resistance to EU employment initiatives became yet more pronounced with the election of a coalition Government in 2010, dominated by the Conservative party, which launched the 'Red Tape Challenge' to identify unnecessary regulations and made clear its vision of a labour market based on minimal intervention by government.³⁰ In the same vein, in 2010 the Government adopted new Guiding Principles for EU legislation, expressing its desire to avoid regulation at EU level 'wherever possible' and setting out its strategy of ensuring that in implementing EU law 'the UK does not go beyond the minimum requirements of the measure which is being transposed'.³¹ This latter policy, coined under the name of avoiding 'gold-plating', was reflected in (for example) amending legislation which reduced the period for consultations with worker representatives in large-scale redundancies to the minimum required by EU law.³²

This broad brush model of resistance to EU employment regulations by UK governments needs qualifying in at least two important respects. First, with the notable exception of the late introduction of the Working Time Regulations, the UK

²⁶ See P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford UP, 2007) 11.

²⁷ *Ibid.* at 45-59.

²⁸ See the DTI consultation *Towards Equality and Diversity* (2001) at 4, available at <https://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1168&external=no&menu=3> (accessed 23 August 2016).

²⁹ Directives 97/81/EC (part-time work), 1999/70/EC (fixed-term work) and 2008/104/EC (agency work). For discussions of the background, see Davies and Freedland, *supra* n. XX, at 57-58, 87-90.

³⁰ Department for Business, Innovation and Skills (BIS), *Flexible, Effective Fair: Promoting Economic Growth Through a Strong and Effective Labour Market* (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf.

³¹ HM Government, *Guiding Principles for EU Legislation*. The current version is at <https://www.gov.uk/government/publications/guiding-principles-for-eu-legislation> (accessed 23 August 2016).

³² See the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013, SI 2013/763.

government has never failed to implement Directives in the employment field, even if it has acted reluctantly and its official policy is to do so at the last minute and in a minimalist fashion. Calls by a government advisor to take the extreme step of risking infraction proceedings before the ECJ rather than give effect to that perennial target of Conservative opposition, the Temporary Agency Workers Directive, went unheeded. The implementing regulations duly came into force two months before the deadline, albeit in the teeth of government opposition and packed with derogations and exclusions.³³

The second qualification relates to the effect of the dialogue between the two court systems, the ECJ and the UK courts. The impact of EU employment law has been significantly enhanced by rulings of the ECJ, which has typically given social rights a wide interpretation and consequently construed any derogations narrowly. The general principle is reflected in the ECJ's repeated mantra in cases on annual leave that the right is a 'particularly important principle of EU social law'.³⁴ This approach was initially alien to the courts in the UK which, lacking a history of social or even human rights in domestic legislation,³⁵ tend to focus on the wording of legislation rather than calibrating the importance of the right at stake. Consequently there are many examples of domestic rulings on EU social rights in employment where the UK courts have taken a narrow view of a right conferred by a Directive, sometimes while refusing to refer the issue to the ECJ, only to be effectively reversed by progressive decisions of the ECJ in favour of workers. Cases on working time again provide an excellent illustration. The confident analyses of the domestic courts on what the Directive meant, in a series of decisions which went in favour of employers, later turned out to be completely wrong.³⁶

³³ See A. Beecroft, *Report on Employment Law* (2011), at 15-16, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31583/12-825-report-on-employment-law-beecroft.pdf (last accessed 23 August 2016) and the Agency Workers Regulations 2010, SI 2010/93.

³⁴ See e.g. the Grand Chamber in Case C-520/06 *Stringer v Revenue and Customs Commissioners* [2009] ECR I-179 at para. 41 and recently in Case C-83/14, *CHEZ Razpredelenie* [2015] IRLR 746 at para. 42. But cf. the discussion of *Alemo-Herron* and *Usdaw* in section 3 below.

³⁵ The European Convention on Human Rights was only given statutory effect in the UK by the Human Rights Act 1998.

³⁶ Examples of such cases from the Court of Appeal (CA) include: *Marshall's Clay v Caulfield* [2004] ICR 1502, CA (rolled-up holiday pay did not infringe Directive); cf. Case C-131/04 and C-257/04, *Robinson-Steele* [2006] ICR 932, ECJ (yes it did); *Gibson v East Riding* [2000] IRLR 598, CA (Article 7 not directly effective); cf. Case C-282/10, *Dominguez* [2012] IRLR 321, ECJ (Article 7 is directly effective); *Stringer* [2005] ICR 1149, CA (workers on sick leave not entitled to annual leave); cf. Case C-520-06, *Stringer* [2009] ECR I-179, ECJ (yes they were); *Bamsey* [2004] ICR 1183, CA and *Williams* [2009] ICR 906, CA (no prescribed level of pay for annual leave under Article 7); contrast the ECJ in Case C-155/10, *Williams v British Airways* [2012] ICR 847 and in Case C- 539/12, *Lock v British Gas* [2014] ICR 813, holding that workers must receive their normal remuneration in respect of annual leave.

But, once corrected by the ECJ on the scope of the EU rights, the domestic courts proved to be enthusiastic about giving domestic effect to them. In complying with the *Marleasing* duty, they have adopted an aggressive approach to interpreting domestic employment legislation to ensure that it corresponds with the meaning and intention of the parent Directives.³⁷ Thus the UK courts have been perfectly prepared to go far beyond the 'ordinary' meaning of domestic legislation and to 'read in' additional words to ensure that it achieves the result required by the relevant Directive.³⁸ In this approach they appear to have gone considerably further than the courts of some other Member States,³⁹ with the result that almost all EU employment Directives have full 'horizontal' effect in the UK.⁴⁰ The combined effect of rulings of the ECJ and a radical domestic approach to interpretation has thus largely overcome the domestic courts' initial unfamiliarity with social rights, and plugged any gaps exposed by the government's policy of minimalist implementation.

Running in parallel with the growth of EU social law was the trajectory of domestic labour law. It is no surprise that the deregulatory policies of UK governments since 1979, including New Labour, were mostly opposed to the development of domestic 'social' rights in employment. This is a long story which has been exhaustively explained elsewhere. Its central features are well known, including attacking legal support for collectively bargained terms and imposing many procedural and substantive restrictions on trade unions' ability to take strike action.⁴¹ The assault on trade unions' collective power was not accompanied by any significant compensation package of domestic, individual legal rights. Wage councils, for example, which set minimum rates of pay in sectors with weak collective bargaining, lost their powers in 1986 and were abolished in 1993.⁴² UK governments displayed little appetite for enacting employment rights which were not driven by Europe. The principal exceptions to this were in the discrimination field where the UK was at the forefront in enacting legislation on disability discrimination, though soon to be overwritten by EU law;⁴³ the national minimum wage legislation;⁴⁴ and the

³⁷ Case C-106/89, *Marleasing v La Comercial Internacional de Alimentacion SA* [1990] ECR I-1435.

³⁸ For examples among many see *Litster v Forth Dry Dock* [1989] ICR 341, *EBR Attridge LLP v Coleman* [2010] ICR 242 and *Bear Scotland v Fulton* [2015] ICR 221. See too the summary of the principles in *Rowstock Ltd v Jessemey* [2014] ICR 550 per Underhill LJ at paras 40-41.

³⁹ See e.g. Case C-441/14, *Dansk Industri v Estate of Rasmussen* [2016] IRLR 552.

⁴⁰ Contrast the isolated cases which prove the rule, holding that domestic legislation could not be construed in accordance with Directive 98/59/EC (on collective redundancies) to allow consultation to begin once redundancies are contemplated, are cited and questioned in *UK Coal Mining v National Union of Mineworkers* [2008] ICR 163 at paras 75-86.

⁴¹ For full accounts, see P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford UP, 1993), chapters 9-10, and Davies and Freedland, *supra* n.26.

⁴² By s.35 of the Trade Union and Employment Rights Act 1993. They had already many powers by virtue of s.11 of the Wages Act 1986.

⁴³ See the Disability Discrimination Act 1995 and, now, the Equality Act 2010.

⁴⁴ The National Minimum Wage Act 1998.

introduction of a statutory procedure by which unions could, after following a labyrinth of rules, gain recognition by employers for negotiations over pay, hours and holidays.⁴⁵

In accordance with the same policy goals, once New Labour was replaced by the coalition Government in 2010, existing individual rights in the employment sphere were removed, watered down or made difficult to enforce. This policy applied especially to those rights which cost, or were perceived as costing, significant sums to businesses. Three examples stand out. The first is health and safety claims by workers. In 2013, in order to tackle what it acknowledged was a perception of a 'compensation culture',⁴⁶ the coalition Government reversed a rule which had stood for over 150 years by which a worker injured as a result of a breach of safety regulations could bring a civil claim for damages.⁴⁷ The second example concerns the right not to be unfairly dismissed, originally enacted in 1971. Though at one time the coalition Government dabbled with proposals to replace the right with 'no fault' dismissal,⁴⁸ in the event it retained the right. But it increased the qualifying period from 12 months to two years and capped the maximum compensatory award at 12 months' gross pay,⁴⁹ so excluding many workers from the right to claim or making the award of little value. The third critical element was the introduction of fees for bringing claims in the employment tribunal, based on the philosophy that 'users' of the tribunal service should pay for it and strongly influenced by business fears about high awards.⁵⁰ Since their introduction in July 2013, fees have led to a precipitous decline in the number of tribunal claims brought, but the Government so far has not conducted its promised review into their effect.⁵¹

⁴⁵ Schedule A2 to the Trade Union and Labour Relations Act 1992 and, for the end game, *British Airline Pilots Association v Jet2com Ltd* [2015] IRLR 543.

⁴⁶ BIS, *Impact Assessment, Strict Liability in Health and Safety Litigation* (2012), paras 17-18, available at <https://www.gov.uk/government/publications/strict-liability-in-health-and-safety-at-work-impact-assessment>.

⁴⁷ See s.69 of the Enterprise and Regulatory Reform Act 2013, amending s.47 HSWA, and e.g. *Couch v Steel* (1852) 3 E & B 402..

⁴⁸ See the Beecroft report, *supra* n. 33.

⁴⁹ See the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012/989 and the Unfair Dismissal (Variation and Limit of Compensatory Award) Order 2013, SI 2013/1949.

⁵⁰ See Ministry of Justice, *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal*, Consultation Paper CP22/2011 (2011), especially foreword at 3-4 and 11-15 (available at https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting_documents/chargingfeesinetandeat1.pdf; accessed 30 August 2016).

⁵¹ See House of Commons Justice Committee, *Courts and Tribunal Fees: Second Report of Session 2016-17*, available with the written evidence to the Committee at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2015/courts-and-tribunals-fees-and-charges/> (accessed 23 August 2016).

Though these initiatives crossed into areas governed by EU employment Directives - fees, for example, affect all types of claim, including those derived from EU Directives, and health and safety claims are now underpinned by EU law - the government was only too well aware that it had to tiptoe round the requirements of EU law. The main brake on its policies was the principle of effectiveness, now enshrined in Article 19 of the TEU, by which Member States must ensure the effective protection of EU rights. It includes a requirement that sanctions for breaches of EU law must be effective, proportionate and dissuasive.⁵² That principle forms the basis of a legal challenge by the trade union, UNISON, to the fees system which so far has been unsuccessful but which is proceeding to the UK Supreme Court.⁵³ It is clear, for example, that the Government wanted to take action to limit awards of compensation for discrimination at work; but, as it acknowledged, EU law precluded any cap on awards, ⁵⁴ 'which effectively restricts the policy options available to address concerns in this area'.⁵⁵

While the UK policy of deregulation of employment rights was in tension with the social regulation emerging from the EU, the conflict between the two legal systems was much less pronounced in relation to the economic freedoms guaranteed by the TFEU, including freedom of establishment and freedom to provide services,⁵⁶ as supplemented by the public procurement Directives.⁵⁷ Earlier Conservative governments supported expansion of the EU to the East, in part to obtain access to cheap labour.⁵⁸ Consistent with their labour market policy, the same governments were enthusiasts for legislation requiring contracting out of public functions, which prohibited the inclusion of 'non-commercial matters' in tendering decisions,⁵⁹ and repealed rules by which public authorities required their contractors to pay 'fair wages'.⁶⁰ Here, then, UK law and policy was mostly in harmony with EU law. The deep, unresolved tension within EU law between the protection of fundamental labour standards and the rules of the internal market⁶¹ has no parallel in the UK, where governments wanted a free market in labour to prevail, unencumbered by

⁵² See e.g. Case C-432/05 *Unibet* [2007] ECR I-2771 and Case C-407/24, *Camacho v Securitas Seguridad España* [2016] ICR 389.

⁵³ *R (UNISON) v Lord Chancellor* [2016] ICR 1, CA.

⁵⁴ See Case C-271/91, *Marshall v Southampton and SW Hampshire AHA* [1993] ECR I-4367 and e.g. Article 18 of Directive 2006/54/EC.

⁵⁵ BIS, *Employment Law Review: Annual Update 2012* (2012), 15-16, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32146/12-p136-employment-law-review-2012.pdf (accessed 23 August 2016).

⁵⁶ See Articles 49 and 56 TFEU.

⁵⁷ Such as Directive 2014/24/EC.

⁵⁸ See P. Anderson, *The New World Order* (Verso 2009), 38-39.

⁵⁹ Local Government Act 1988, s.17 (now repealed).

⁶⁰ For the history, see C. McCrudden, *Buying Social Justice* (Oxford UP 2007), 42-53.

⁶¹ See the illuminating discussion by M. De Vos, *Internal Market and Euro-Crisis: Labour Law Under the Gun of the European Union?*, ERA Forum 14 335-361 (2013).

legal props or government support for collective bargaining. This may explain, too, why there has been little ECJ case-law from the UK of the sort which has arisen in other Member States, such as Germany, grappling with the tension between the imposition of wage rates laid down in sectoral collective bargains and the economic freedoms in the Treaties.⁶²

Another economic freedom, the right to free movement of workers, guaranteed principally by Article 46 TFEU, was at the heart of the inflammatory debates during Brexit about immigration from the EU into the UK. This large topic strays far beyond employment policy, and I will not examine it here. My focus will be on the effect of Brexit on social rights in the employment sphere.

3. THE CURRENT POSITION

It is a historical curiosity that the Brexit referendum occurred at a time when the conflict between employment rights emanating from Europe and a deregulatory employment law agenda in the UK had entered a period of truce and calm, probably as a result of the austerity policies adopted by the EU. No significant Directives were introduced after the Temporary Agency Work Directive was finally passed in late 2008.⁶³ Recent Commission publications increasingly use similar language to UK government policy papers, referring to the need to avoid over-regulation and to the 'red tape' holding back small businesses.⁶⁴ While there are no proposals to remove existing employment rights, the Commission's current work programme in employment is very restrained indeed, with the emphasis on monitoring the coherence and effectiveness of existing legislation, rather than introducing new Directives.⁶⁵ The most significant proposal, to amend the Posted Workers Directive

⁶² For example, Case C-346/06 *Rüffert* [2008] ECR I-1989, Case C-549/13 *Bundesdruckerei* [2014] IRLR 980 and Case C-346/06, *Regiopost* [2016] IRLR 125.

⁶³ Directive 2010/18/EU, on parental leave, was a revision of the earlier Directive 96/34/EC, and in common with its predecessor did not require that leave be paid. Likewise the Works Council Directive 2009/38/EC was a recasting of the earlier Works Council Directive 94/45/EC.

⁶⁴ See e.g. the Commission communication, *Better Regulation for Better Results - an EU Agenda*, COM (2015) 215 final (2015) at 5-7 (available at http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf (accessed 24 August 2016)), drawing on the *Better Regulation Guidelines* SWD (2015) 111 final (2015), available at http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf (accessed 24 August 2016).

⁶⁵ See the *Commission Work Programme 2016* COM(2015) 610 final at http://ec.europa.eu/atwork/pdf/cwp_2016_en.pdf (accessed 24 August 2016); and the *List of Planned Commission Initiatives* (2016) at http://ec.europa.eu/atwork/pdf/planned_commission_initiatives_2016.pdf (accessed 24 August 2016). The initiatives include, for example, a proposal to recast the three information and consultation Directives to make the law simpler and a proposal to amend the Framework Directive 89/391/EEC on health and safety to modernise it and improve its flexibility. There is also a consultation on giving more flexibility in work arrangements for parents and carers: see the Commission *Consultation*

so that rates of pay set out in collective agreements which have been declared 'universally applicable' apply to posted workers, is of little relevance to the UK because it has no system for making collective agreements legally binding across a sector.⁶⁶ Nor would the Commission's proposal for a 'European Pillar of Social Rights' directly affect the UK even if it remained in the EU because it envisages rights restricted to those countries in the euro-zone, with an option for others to join if they wish and no more.⁶⁷

In addition, during the same period of austerity, the ECJ has subtly shifted its approach to employment rights, giving greater weight to the interests of business than it had hitherto. Two decisions shine out, though it is too early to discern a clear trend in the terse and Delphic language of the ECJ. In *Alemo-Herron*, the ECJ held that collective agreements in the public sector did not have 'dynamic' effect under the Acquired Rights Directive⁶⁸ so as to upgrade the terms and conditions of local authority workers after their employment transferred to a private company. Drawing support from the freedom to conduct a business recognised in Article 16 of the EU Charter of Fundamental Rights, the ECJ ruled that the Directive did not only aim to safeguard the rights of employees (which had been its previous position) but also sought to strike a 'fair balance' between the interests of employees and employers.⁶⁹ The Court adopted a similar approach to the Collective Redundancies Directive⁷⁰ in *USDAW v Ethel Austin*, holding that its objective was not solely to protect workers but also to harmonise costs for EU businesses.⁷¹

But a couple of decisions of the ECJ sympathetic to business and the absence of significant new employment Directives on the horizon were never going to be enough to quell the objections of 'leavers' in the Brexit debates to what they described as the 'unelected' Commission and the 'unaccountable' ECJ.⁷² The past

Document C(2016) 2472 final, dated 12 July 2016, available at http://ec.europa.eu/justice/gender-equality/economic-independence/economic-growth/index_en.htm (accessed 25 August 2016).

⁶⁶ See the Commission Proposal COM(2016)128 final, available at <http://ec.europa.eu/social/main.jsp?catId=471> (accessed 24 August 2016).

⁶⁷ See the Commission, *Launching a Consultation on a European Pillar of Social Rights* COM(2016) 127 final, at para. 3 (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1457706909489&uri=COM:2016:127:FIN>; accessed 24 August 2016). For discussion, see K. Lörcher and I. Schömann, *The European Pillar of Social Rights: Critical Legal Analysis and Proposals* (European Trade Union Institute, 2016)

⁶⁸ Directive 2001/23.

⁶⁹ Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd* [2013] ICR 1116.

⁷⁰ Directive 98/59.

⁷¹ Case C-80/14, [2015] ICR 675 at para. 62.

⁷² See e.g. Michael Gove, one of the prominent leavers in the Conservative party, reported in the *Daily Telegraph* of 20 February 2016 (<http://www.telegraph.co.uk/news/newstopics/eureferendum/12166345/European-referendum-Michael-Gove-explains-why-Britain-should-leave-the-EU.html>; accessed 25 August 2016).

record of the EU in dictating ‘tens of thousands’ of rules in all areas,⁷³ including in employment, was a sufficient and irredeemable sin.

Stepping back, we can see that by the time of the Brexit referendum, UK employment law was radically different from how it was at the time the UK joined the then EC in 1973. A very substantial part of UK employment rights is now derived from EU law, and an even larger body is guaranteed by EU law. The importance of these EU rights is not just in terms of quantity: they are supported by strong EU rules on how they must be protected and enforced.

A full account of the relevant rights is set out in an advice I wrote for the TUC prior to the Brexit referendum.⁷⁴ In summary, they include protection against discrimination owing to sex, pregnancy, race, disability, religion and belief, age, and sexual orientation throughout the employment relationship, including access to employment, treatment at work, dismissal and post-employment victimisation;⁷⁵ equal pay between men and women for work of equal value; health and safety protection of pregnant women and their rights to maternity leave, dismissal and maintenance of terms and conditions of employment; parental leave; a degree of equal treatment, in broad terms, for the growing number of fixed-term, part-time and agency workers; rights to protected terms and conditions and not to be dismissed on the transfer of an undertaking; rights of worker representatives to information and consultation about redundancies, transfers and health and safety; more general rights to information and consultation under the European Works Council Directive⁷⁶ and the Information and Consultation Directive⁷⁷ in undertakings above a certain size; the most important, general health and safety regulations which apply at work, including those governing workplaces, work equipment, personal protective equipment, display screen equipment and manual handling; the right to a written statement of terms and conditions; almost all the law on working time,⁷⁸ including paid annual leave and limits on daily and weekly working time; and state guarantees of employees’ claims where an employer is insolvent.

⁷³ See Michael Gove in the *Daily Telegraph*, *ibid*.

⁷⁴ M.Ford, *Workers’ Rights from Europe: The Impact of Brexit* (March 2016), available at <https://www.tuc.org.uk/international-issues/europe/eu-referendum/workplace-issues/brexit-could-risk-%E2%80%9Clegal-and-commercial> (accessed 24 August 2016).

⁷⁵ Nationality discrimination, included in the UK Equality Act 2010, is not dealt with in Directive 2000/43/EC on race discrimination, though discrimination against EU nationals is prohibited by Article 45 TFEU.

⁷⁶ Now Directive 2009/38/EC.

⁷⁷ 2002/14/EC.

⁷⁸ The exception is that UK law guarantees paid annual leave of 5.6 weeks, not the minimum of four weeks in the parent Directive: see regulation 13A of the Working Time Regulations 1998.

Areas beyond EU social law have also had an important influence on employment regulation in the UK. For example, the EU Directive on the processing of personal data,⁷⁹ to be replaced in May 2018 by the new Data Protection Regulation,⁸⁰ led to the Data Protection Act 1998. This Act in turn generated a code of practice in the UK which assists in regulating how employers process data about and monitor their workers⁸¹ - an area in which there was little domestic law at all beforehand.

Moreover, as explained in my advice to the TUC,⁸² these rights are underpinned by relatively strong rules for giving effect to them which in the UK are probably as significant as the rights themselves. First, as explained above, the domestic courts have taken a radical approach to the duty to interpret national law in accordance with EU law.⁸³ Second, in the unlikely event that interpretation does not achieve harmony with EU law, many EU employment rights are sufficiently clear to be directly effective - principally against state bodies but also horizontally, against private employers, in the case of the right to equal pay in Article 157 TFEU and the nascent category of 'general principles', such as the prohibition of discrimination.⁸⁴ Third, the UK government has invariably complied with rulings of the ECJ in infringement proceedings that its law is out of step with Directives on employment law, no doubt conscious that if it fails to do so it may be sued directly for its failure to implement EU law.⁸⁵ Finally, the EU rights are underpinned by strong principles on procedures and remedies, including the principle of effectiveness which led, for example, to the removal of historical caps on compensation for discrimination.⁸⁶

None of these processes has an analogue in the case of ordinary treaties, such as those of the ILO, ratified by the UK, which only give rise to a strong presumption that domestic law should be interpreted in accordance with them.⁸⁷ Perhaps as a result, ILO treaties ratified by the UK have had little practical effect on domestic labour laws, exemplified by their minimal effect on the UK's strike laws.⁸⁸ They are stronger than the means by which domestic legislation gives effect to the European

⁷⁹ Directive 95/46/EC.

⁸⁰ Regulation 2016/679.

⁸¹ The Employment Practices Data Protection Code, issued by the Information Commissioner under s.51(3) of the 1998 Act, and available at https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf (accessed 24 August 2016).

⁸² See *supra* n. 74 at paras 9-26.

⁸³ See my advice to the TUC, *supra* n.74, at paras 17-18.

⁸⁴ See my advice for the TUC, *supra* n.74, at paras 14-16 and *Rasmussen*, *supra* n. 39.

⁸⁵ See advice to the TUC, *supra* n.74, at para. 19 and Case C-479/93, *Francovich v Italy* [1995] ECR I-3843.

⁸⁶ Advice to the TUC, *supra* n.74, at paras 21-25 and *Marshall (No.2)*, *supra* n. 54, above.

⁸⁷ See *Hounga v Allen* [2014] ICR 847 at para. 50.

⁸⁸ See, for example, the very limited impact of ILO Conventions on the right to strike, exemplified by the rulings in *Metrobus v Unite* [2010] ICR 173 and *RMT v Serco* [2011] ICR 848.

Convention on Human Rights (ECHR): the Human Rights Act 1998, which retains the power of Parliament to legislate contrary to Convention rights.⁸⁹

The intriguing counterfactual question for labour historians is what domestic labour law would look like now if the UK had never joined the EU. There are obvious provisions which it appears the UK would never have adopted but for EU membership, illustrated by its resistance to the Directives at the time, its reluctant implementation, or the mismatch of the Directives with a domestic labour agenda based on promoting a 'flexible' labour market. Legislation in this category includes, I think, the Working Time Directive; legislation protecting fixed-term, part-time and agency workers; all the requirements to inform and consult worker representatives; significant elements of the rules protecting employees on transfers of an undertaking, such as those which prevent a transferee placing transferred workers on the same terms as its existing workforce (a constant thorn in the side of businesses); and much of the EU law on health and safety at work. It is doubtful, too, that laws protecting against age discrimination would have been enacted, given their complexity (which entailed a very long period of consultation about the detail) and the contemporary attitude of the government.⁹⁰

In addition, limits on compensation for discrimination and other breaches of employment law would probably still be a common feature of UK employment law but for the judgments of the ECJ in cases such as *Marshall No.2* and *Levez*.⁹¹ Such caps were elements of the original UK legislation on discrimination,⁹² and accord with recent government policy of using damage thresholds where compensation is perceived by business as high, illustrated by the recent changes made to the compensation recoverable for unfair dismissal. Indeed, the previous Government wanted to examine discrimination awards as part of the Employment Law Review it conducted between 2010 and 15 'in response to business concerns about the uncapped nature of awards in cases of discrimination',⁹³ but was effectively blocked by EU law. For similar reasons, I doubt that UK legislature would have allowed equal pay laws to spread their tentacles into pensions, requiring complicated and costly equalisation of retirement ages and pension benefits for men and women.⁹⁴

⁸⁹ See especially s.4 and s.6 of the 1998 Act.

⁹⁰ See Davies and Freedland, *supra* n. 26, at 84-86.

⁹¹ Case C-271/91, *Marshall*, *supra* n. 54 and Case C-326/96, *Levez v TH Jennings* [1998] ECR I-7835.

⁹² See, in their original form when enacted, s.65 of the Sex Discrimination Act 1975, s.56 of the Race Relations Act 1976, and s.2 of the Equal Pay Act 1970.

⁹³ BIS, *Employment Law Review: Annual Update 2012* (2012), 15-16, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32146/12-p136-employment-law-review-2012.pdf (accessed 23 August 2016).

⁹⁴ As a result of cases such as e.g. C-262/88, *Barber* [1990] ECR I-1880.

But taking something away is a much more difficult process than not giving it in the first place, as any parent knows and as a large body of research on ‘risk aversion’ confirms.⁹⁵ The counterfactual question focussing on the past is an incomplete guide to the future. The most difficult exercise of all is to contemplate what is likely to happen post-Brexit to the EU-guaranteed employment rights currently in force in UK domestic law. This is a highly speculative exercise, but in the next section I nonetheless try to highlight some of the factors at play.

4. THE POST-BREXIT FUTURE

As a result of the Brexit referendum it is at present likely (but by no means certain) that the UK will leave the EU, though the time frame is still unclear.⁹⁶ But it is pretty much unimaginable that once the UK leaves any significant part of the employment law derived from the EU would be repealed *en bloc* immediately or very soon afterwards. Rather, the overwhelming likelihood is that the process of deciding which elements of EU-derived employment law to ditch will take place gradually, over many years, and only once the process of extraction from the EU has been completed. There are several reasons for this.

The first requires a little explanation of how implementing legislation works in the UK. In broad terms, secondary legislation in UK law is unlawful and *ultra vires* if it does not fall within the scope of a power set out in an Act of Parliament. The statute in the UK which gives legal effect to the EU Treaties is the ECA 1972. A good deal of secondary legislation implementing EU law has been introduced under the ECA 1972, which contains an express power allowing the introduction of secondary implementing legislation.⁹⁷ If the ECA were repealed, as some Brexiteers have called for, in theory all the implementing legislation introduced under it would fall away too.⁹⁸ But some implementing employment legislation in the UK is primary legislation, such as the Equality Act 2010 protecting against discrimination at work, so it would be unaffected by the repeal. Other secondary, implementing legislation was introduced not under the ECA but under different primary legislation, and so would also be unaffected by repeal of the ECA.⁹⁹ Some regulations were made under *both* the ECA and another Act, giving rise to bewildering issues as to their legal

⁹⁵ See e.g. E. Zamir, *Law, Psychology and Morality: The Role of Loss Aversion* (Oxford UP, 2015).

⁹⁶ And as I write one of the candidates in the contested Labour leadership, Owen Smith, has said that if he becomes prime minister he will not trigger Article 50 without a further referendum.

⁹⁷ ECA 1972, s.2(2). The scope of the power is discussed in *United States v Nolan* [2015] ICR 1347.

⁹⁸ *Watson v Winch* [1916] 1 KB 688.

⁹⁹ For example, the Fixed-Term Employees (Protection of Less Favourable Treatment) Regulations 2002 (SI 2002/2034), giving effect to the Fixed-Term Workers Directive 99/70/EC, made under the Employment Act 2000.

validity if the ECA alone were repealed.¹⁰⁰ This is quite apart from the legal chaos that would arise if the ECA (or implementing regulations) were repealed without detailed rules explaining the necessary transitional provisions.

The second, more obvious, reason is that not even the most right wing of the pro-Brexit Conservatives wishes to repeal *all* the UK employment legislation which gives effect to EU law or which was made under the ECA. Post-Brexit, then, a process is likely to begin of identifying which EU-derived employment legislation should be repealed. There already exist legal models in the UK for using secondary legislation to identify and remove legislation, both secondary and primary legislation, which is viewed as constituting a 'burden', involving consultation with those who are substantially affected and a rapid Parliamentary process.¹⁰¹ This is the sort of model which is likely to be adopted to strip out undesired EU-based legislation after Brexit, not confined to the employment sphere. But this process is unlikely to take place quickly, given the amount of government time and resources which will be devoted to negotiating post-Brexit trading agreements and the need to scrutinise each piece of legislation individually.

The likely prospect, then, is that the date of Brexit will precede any assault on the substantive employment rights underpinned by EU law. But there will be an interim period when the legal waters could become very muddy indeed. Even if the rights themselves survive, leaving the EU would presumably put an end to the doctrine of direct effect, the ultimate source of which is the TEU.¹⁰² It would end, too, the jurisdiction of the ECJ to make rulings on preliminary references from courts of a 'Member State' under Article 267 TFEU. These changes are likely to have a detrimental impact on workers' rights in the UK.¹⁰³ How to interpret existing UK legislation implementing or in the field of EU law post-Brexit will then give rise to some very awkward questions. The *Marleasing* duty, requiring national courts to interpret national law so far as possible to achieve the result required by EU, is itself a product of the Treaties.¹⁰⁴ Post-Brexit, when the Treaties no longer apply to the UK, should the courts follow earlier judgments based on an interpretative obligation which no longer applies? What weight should be given to pre- or post-Brexit judgments of the ECJ made on references from other Member States in relation to

¹⁰⁰ For example, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), implementing the Acquired Rights Directive, were made under the ECA and the Employment Relations Act 1999.

¹⁰¹ See e.g. Part I of the Legislative and Regulatory Reform Act 2006, by which a Minister may introduce statutory instruments to remove 'burdens' resulting from legislation including primary legislation.

¹⁰² See Article 4(3).

¹⁰³ See my advice to the TUC, *supra* n. 74, at para. 12.

¹⁰⁴ Principally the duty of Member States under Article 4(3) TEU: see e.g. Case C-106/89, *Marleasing* [1990] ECR I-4135 and Case C-397/01, *Pfeiffer* [2004] ECR I-8835.

Directives implemented by legislation in the UK? To what extent should UK courts abandon the radical approach to interpretation they have hitherto adopted to ensure compliance with EU law, and revert to their traditional focus on the 'ordinary' language? These are uncharted waters, and apply to all areas in the field of EU law. They may well require some form of interim legislative response in the interests of legal certainty and of avoiding legal chaos in the medium-term.¹⁰⁵

But what of the long-term fate of the employment rights guaranteed by EU law? Predictions of future government action in this area, which I have described as characterised by radical indeterminacy, are dangerous, especially since any changes are unlikely to occur in the near future. All one can reasonably do is begin to sketch out the policy aims, and the constraints and other factors shaping actual labour market regulation, to give some idea of where the UK may be heading.

The first of these factors is the vision of the UK government for employment regulation. At present the Labour party is trailing badly in the polls, and the prospect is of a Conservative government continuing in power up to and beyond the general election scheduled for 2020. Should Labour be elected - and where it will be in five years' time is anyone's guess - it is unlikely to target any EU-derived employment rights for repeal or weakening. Its present policies under Jeremy Corbyn are for a radical strengthening of workers' rights, including compulsory collective bargaining for employers with over 250 staff.¹⁰⁶ Not even those on the Right of the Labour party hint at reducing existing workers' rights, and almost all EU-derived rights are a floor not a ceiling.¹⁰⁷ Leaving the EU allows the Labour party greater freedom of policy in other areas, such as proposals to renationalise the railways, but it has little effect on its employment policy.

What of the Conservative party? Although the labour market philosophy of the Conservative party today is not as clearly articulated as the one of the Thatcher era,¹⁰⁸ the thrust of the policy is in the same direction: a deregulated market, dominated by freedom of contract as regards the individual employment relationship, coupled with hyper-regulation in order to diminish the collective power of trade unions. The last coalition Government revealed its broad philosophy in the publication, *Flexible, Effective, Fair: Promoting Economic Growth Through a Strong*

¹⁰⁵ See S. Laws, *Article 50 and the Political Constitution* (U.K. Const. L. Blog (18 July 2016); available at: <https://ukconstitutionallaw.org/> accessed 30 August 2016).

¹⁰⁶ See 'Corbyn Pledges to Scrap Blair Union Laws in Favour of Collective Bargaining' in *The Guardian* 30 July 2016, available at <http://www.theguardian.com/politics/2016/jul/30/jeremy-corbyn-scrap-labour-union-laws-pledge> (accessed 26 August 2016).

¹⁰⁷ See my advice to the TUC, *supra* n 74, at para. 29.

¹⁰⁸ See Davies and Freeland, *Labour Legislation and Public Policy*, n XXX *supra*., especially chapters 910 and E.Green, *Ideologies of Conservatism* (Oxford UP, 2002), chapter 8.

and Efficient Labour Market.¹⁰⁹ The flimsy document celebrated the UK's comparative advantage arising from its 'light touch system of labour regulation' - according to the OECD only surpassed by the USA and Canada among developed countries - and made clear the Government's desire to 'minimise....intervention in the labour market', with a core of fundamental protections 'limited to the minimum necessary'.¹¹⁰ Following the election of 2015, and now freed from the constraints of a coalition, the Conservative Government introduced the Trade Union Act 2016 (TUA 2016), adding very significant and often insurmountable hurdles to the existing labyrinthine rules which restrict unions' ability to take strike action.¹¹¹ The influence of right wing 'think tanks' on the Conservative party remains as strong as ever. The genesis of the TUA 2016, for instance, was a paper produced by the think tank, Policy Exchange, based on free market theories which questioned whether workers should be able to strike at all save in conditions where this served market efficiency.¹¹²

Up to now, the large, immovable blot on this vision of a highly flexible labour market has been EU-derived employment regulations. During the course of the debates before Brexit, for example, prominent Conservatives on the 'leave' side repeatedly complained of the £600 million per week cost of EU regulations, drawing on a report from the influential think tank, Open Europe.¹¹³ That report, based on information in the UK government impact assessments published at the time of draft implementing legislation, placed several employment law Directives high up in the list of the 'top 100' costliest EU regulations, in particular the legislation on working time and that protecting agency workers.¹¹⁴ Though the assumptions of the impact assessments are often questionable and the claims were made by 'leavers' from the Right of the Conservative party, they mostly reflect an orthodox Conservative vision of labour market regulation, illustrated by the legislative interventions of the

¹⁰⁹ BIS 2011, *supra* n. 30.

¹¹⁰ *Ibid.* at paras 4-9. For similar visions, see BIS, *Employment Law 2013: Progress on Reform* (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184892/13-P136-employment-law-2013-progress-on-reform2.pdf

¹¹¹ See the articles in 45(3) Ind.L.J. (2016).

¹¹² See E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* (Policy Exchange: 2010), available at <http://www.policyexchange.org.uk/images/publications/modernising%20industrial%20relations%20-%20sep%2010.pdf> (accessed 25 August 2016). For discussion, see A. Bogg, *Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State* 45(3) Ind.L.J. (2016).

¹¹³ See e.g. the article in the *The Guardian*, 11 May 2016, available at <http://www.theguardian.com/politics/2016/may/11/boris-johnson-launches-the-vote-leave-battlebus-in-cornwall>.

¹¹⁴ Open Europe, *Top 100 EU Rules Cost Britain £33.3 bn*, available at <http://openeurope.org.uk/intelligence/britain-and-the-eu/top-100-eu-rules-cost-britain-33-3bn/> (accessed 26 August 2008).

previous government in areas where EU did not preclude action.

Since the Brexit referendum, however, the prominent leavers have been strangely silent on this topic. The latest statement on this fluctuating, opaque policy from David Davis MP, the government Minister responsible for negotiating the Brexit deal with the EU, headed in the opposite direction. He said that the working class who voted for Brexit should not be penalised by losing their employment rights.¹¹⁵ Pragmatism and electorate appeal may trump economic ideology, as so often in the Conservative party's past.¹¹⁶ But gratitude has its temporal limits, the internal tensions with the Conservative party remain, and if the UK economy begins to stutter pre- or post-Brexit we can expect the calls for labour market deregulation to become more strident. The spotlight is likely to return to old favourites, such as capping discrimination awards; repealing the perennial objects of Conservative venom, working time and agency workers' rights; or exempting small businesses from employment 'red tape'.¹¹⁷

There are three other elements to future policy that I want to highlight. They are likely to play a central role in shaping the eventual form of labour law regulation in the UK.

The first is employment tribunal fees. For the moment they have led to a decrease in around 70% of claims compared with the position before they were introduced.¹¹⁸ Their short-term fate depends upon the judicial review challenge pending before the Supreme Court, based the EU principle of effectiveness, and the Ministry of Justice's own internal review, long awaited but still unpublished.¹¹⁹ If they survive in something like their current form, a future government may conclude that the practical effect of UK employment rights is sufficiently restricted that it is not

¹¹⁵ D. Davis, Trade Deals. Tax Cuts. And Taking Time Before Triggering Article 50. A Brexit Economic Strategy for Britain, 14 July 2016, available at <http://www.conservativehome.com/platform/2016/07/david-davis-trade-deals-tax-cuts-and-taking-time-before-triggering-article-50-a-brexit-economic-strategy-for-britain.html> (accessed 30 August 2016).

¹¹⁶ A. Seddon, *The Conservative Century* in *The Conservative Century* (A. Seddon & S. Ball eds, Oxford UP, 1994).

¹¹⁷ Something advocated by e.g. the former employment minister, Priti Patel: see 'Brussels diktats "costing families £4,600 a year"' in the *Daily Mail* 28 April 2016 (available at <http://www.dailymail.co.uk/news/article-3562573/Brussels-diktats-costing-families-4-600-year-Employment-minister-say-homes-small-businesses-throttled-Brexit-boost-economy-billions.html>; accessed 30 August 2016).

¹¹⁸ D. Pyper, F. McGuinness, *Employment Tribunal Fees* (House of Commons Briefing Paper, 13 May 2016), 12-13, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081> (accessed 31 August 2016).

¹¹⁹ See the House of Commons Justice Committee report, *supra* n. 51.

necessary to remove the substantive rights. Alternatively, freed from the EU rules on effective vindication of rights, it may go further still in using collateral devices, such as high tribunal fees, to undermine the effect of the rights. Fees especially deter claims of low value: combine high fees with limits on compensation, for example, and legal rights on the statute book can become largely symbolic in fact. In such a system, the government may have little incentive to take the politically controversial step of removing the rights themselves.

The second factor is the type of trade deal which the UK tries to obtain and in fact obtains from the EU. At present the UK's trade deals are an incident of its membership of the EU, and by virtue of Article 207 TEU it cannot negotiate individual trade deals while still a member. Prior to the referendum, the Government produced no clear plan of the trade deal it envisaged with the EU should the vote be for Brexit, and still none has been produced. The document the government did publish set out details of five possible arrangements - those the EU currently has with Norway, Switzerland, Canada and Turkey and a relationship based simply on WTO membership - but simply said that the UK would 'seek the best balance of advantage'.¹²⁰ For the UK, ending free movement of workers is likely to be a key issue for the type of deal it wants, given the central role played by immigration in the debates before the referendum, whereas the EU may insist on retaining those rights for access to the single market. While employment rights are unlikely to be anything more than peripheral to the negotiations, the type of deal ultimately obtained has important consequences for employment rights.

At one extreme, for example, is the Norway model, involving membership of the European Economic Area (EEA). As well as entailing free movement of workers¹²¹ and submission to the jurisdiction of the EFTA Court, it requires adherence to EU employment legislation, with the exception of EU equality law outside sex discrimination.¹²² The adoption of the Norway model, then, would leave UK labour law pretty much unchanged from its current position in relation to EU law, given that anti-discrimination law on race, disability and sexual orientation (for example) has achieved a large degree of political consensus within the UK; but the inclusion of free movement of workers on this model makes this model politically unappetising to the UK government. At the other end of the spectrum, the Canadian trading agreement with the EU, which seems to be the one currently in vogue with the government, contains only an obligation of mutual recognition of professional

¹²⁰ HM Government, *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (March 2016), at 5; available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504604/Alternatives_to_membership_-_possible_models_for_the_UK_outside_the_EU.pdf (accessed 30 August 2016).

¹²¹ Article 28 EEA Agreement and Annex V.

¹²² Articles 66-70 and the instruments listed in Annex XVIII of the EEA Agreement.

qualifications.¹²³ The EU, of course, may have other views and strategies to pursue, and employment rights may end up being small bargaining chips in a bigger trading game, which will take many years to play out.

A third important factor is the position of the devolved administrations in Scotland, Wales and Northern Ireland. While Wales and England were both in favour of leaving the EU, in Scotland 62 per cent of those voting were in favour of remain, as were 56 per cent of voters in Northern Ireland. These different results place further strain on the unity of the UK, less than two years after a close referendum on Scottish independence. Shortly after the referendum the First Minister for Scotland, Nicola Sturgeon, and the Scottish Parliament both made clear their wish to remain in the EU.¹²⁴ At present employment rights and duties, industrial relations and health and safety at work are 'reserved' matters, outside the scope of the Scottish Parliament's legislative powers, including implementing EU law in these areas.¹²⁵ By contrast, the devolved Northern Ireland legislature has the general power to legislate in the employment field, save for the national minimum wage,¹²⁶ though it too must not legislate contrary to EU law.¹²⁷ Triggering Article 50 is not a decision for either the Scottish Parliament or the Northern Ireland Assembly.¹²⁸

No doubt this devolution legislation will require amendment, post-Brexit, to remove the binding force given to EU law. But there are other issues more specific to employment law. The prospect of the London-based UK Parliament, post-Brexit, legislating to remove EU-derived worker rights not only in England but also in Wales and Scotland is unlikely to be welcomed by the devolved Welsh or Scottish administrations or their electorate, which tend to be more to the Left. Objections of this sort were already visible during the passage of the Trade Union Act 2016 through Parliament.¹²⁹ Any moves to deregulate employment law across the UK may well generate increased pressure for greater devolution of employment policy and law. The arguments of the 'leavers', that leaving the EU would give them democratic control over 'their' employment laws, will then be deployed by the devolved countries against the UK government and Parliament.

¹²³ See HM Government, *Alternatives to Membership*, supra n. 120, at 30-34.

¹²⁴ For the background, see V. Miller (ed.), *Brexit: Impact Across Policy Areas* (House of Commons Briefing Paper, 26 August 2016) at 165-172, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213> (accessed 30 August 2016).

¹²⁵ Scotland Act 1998, ss 29-30 and Schedule 5, paras H1 and H2. Note too that the Scottish Parliament must not legislate contrary to EU law under s.29(2)(d).

¹²⁶ Northern Ireland Act 1998, s. 4 and s.6 and Schedule 3 para. 21.

¹²⁷ Northern Ireland Act 1998, s.6(2)(d). The settlement in Wales includes some employment matters peripherally: see *In re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622.

¹²⁸ Scotland Act 1998, Schedule 5, para. 7; Northern Ireland Act 1998, Schedule 2 para. 3.

¹²⁹ A. Bogg, supra n. 112.

5. CONCLUSION

If Brexit happens, UK employment law will enter uncharted waters. Tribunal fees have already had a dramatic effect on employment rights but over the past forty or so years we have grown accustomed to a floor of fundamental EU social rights, setting clear limits on policy and law in this area. UK government opposition to those rights, and the dialogue between national courts and the ECJ, have become central organising themes of UK labour law. When and if Brexit happens the fate of those rights, and the procedural rules and remedies which underpin them, is very unclear. Their legal interpretation post-Brexit will be difficult enough, but the future shift in UK labour law is highly unpredictable. The Brexit referendum has only temporarily papered over the different positions within the Government, the electorate and the regions, both on labour market policy and beyond, which the need to open negotiations on the terms of Brexit will expose anew. Changes to existing EU-derived employment laws are unlikely to occur soon after Brexit, and not until after the general election in 2020, when the shape of policy alone is hard to predict, let alone the other factors affecting the adoption of labour laws. We are entering strange but interesting times.

